

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 September 2006

Case No.: 2005-LHC-1338

OWCP No.: 07-172695

IN THE MATTER OF

B. S.,

Claimant

vs.

NORTH AMERICAN SHIPBUILDING,
Employer

APPEARANCES:

J. PAUL DEMAREST, ESQ.,
On Behalf of the Claimant

ANNE DERBES KELLER, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),¹ brought by B.S. (Claimant) against North American Shipbuilders (Employer).

¹ 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 4 Apr 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:²

Witness Testimony of

Claimant
Claimant's Spouse
James Porter
Mike Bergeron
Bill Underwood

Exhibits³

Claimant's Exhibits (CX) 1-30
Employer's Exhibits (EX) 1-41
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS⁴

1. If the injury took place as Claimant alleged:
 - a. There is jurisdiction and coverage under the Act.
 - b. There was an employee/employer relationship.
 - c. The injury was within the course and scope of employment.

² I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

³ Offering records en globo may save the offering counsel time by allowing them to avoid actually reviewing every document that they are submitting and removing those which are duplicated elsewhere in the record (sometimes even duplicated on multiple occasions within their own exhibits) or have no real bearing on any litigated issue. However, such a practice wastes the time of the Court, which must review each document. See, e.g., CX-2 (contains two identical copies of the first page of an accident report, but is missing the second page of the report, which is present in its entirety at EX-5), CX-9 (contains multiple duplications of records request letters and records relating to a flu vaccination); CX-24; and CX-29. Additionally, such a practice fails to identify records which are so cryptic and illegible as to be of little probative value, even if they are relevant. See, e.g., CX-6 pp.10, 28, 96; CX-10 p. 11. An inadvertent duplication or occasional lapse in reviewing exhibits that a party intends to offer is to be expected, but the en globo practice simply reflects counsel taking the evidentiary path of least resistance. The quality of representation is a factor to consider in awarding attorney fees. It includes the degree of attention to administrative detail and the extent to which counsel actually knew what was in the evidence they offered.

⁴ JX-1, Tr. 14-15.

2. The claim was controverted on 21 Dec 04.
3. There was an informal conference on 9 Mar 05.
4. Claimant's average weekly wage as of 12 Aug 04 was \$697.29.
5. No compensation benefits have been provided.

FACTUAL BACKGROUND

Claimant alleges that while working for Employer, he injured his back as he tried to move a welding box. He worked for a few days but eventually had to stop. He sought treatment and asked for a release to return to work. Employer's doctor would not release him and as a result, Employer discharged Claimant.

ISSUES

The case presents a stark contrast in the parties' versions of the facts. Claimant argues that he injured his back at work in August 2004 and told his foreman about it. He alleges that the foreman refused to complete an accident report because the foreman thought the injury was a previous one. Claimant further alleges that when he went to the personnel manager he was convinced to file his claim as not work related, so he could receive short term disability benefits. Claimant submits that he was led to believe that Employer would "take care of him." Claimant received some short term benefits, but was eventually terminated. In his view, he was not taken care of. Claimant met with an attorney and discovered he may have committed fraud by claiming and accepting short term disability payments for a work related injury. Claimant seeks medical care and disability compensation.

Employer responds that Claimant actually told his co-workers, supervisors and managers that his injury was sustained in a previous job and that he did not want to fill out an accident report. The first time Employer had any reason to know that Claimant was alleging a work related injury was when it received a letter from Claimant's attorney. Employer argues: (1) there was no work related injury and any back pain was a natural progression of his condition; (2) if there was a new or exacerbating injury, there was no notice; (3) if there was an injury and notice, any exacerbation of a previous injury or new injury resolved by October; and (4) Claimant did not suffer any additional disability, but if he did, Employer established suitable alternative employment.

LAW

Compensable Injury

Section 2(2) of the Act defines “injury” as “accidental injury or death arising out of or in the course of employment.”⁵ In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.⁶ The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.⁷

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which *could have caused* the harm or pain.⁸ These two elements establish a *prima facie* case of a compensable “injury” supporting a claim for compensation.⁹

If the work injury aggravates a pre-existing condition, the aggravation is compensable under the Act. Employers accept their employees with the frailties which predispose them to bodily injury.¹⁰

The presumption does not apply, however, to the issue of whether a physical harm or injury occurred¹¹ and does not aid the claimant in establishing the nature and extent of disability.¹²

⁵ 33 U.S.C. § 902(2).

⁶ 33 U.S.C. § 920(a).

⁷ *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).

⁸ *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

⁹ *Id.*

¹⁰ *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-8 (D.C. Cir. 1967).

¹¹ *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

¹² *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

Although the Act must be construed liberally in favor of the claimant,¹³ the “true-doubt” rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,¹⁴ which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.¹⁵

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.¹⁶ A claimant’s credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.¹⁷

Notice of Injury

The Act bars claims unless the claimant notifies the employer of his work related injury within thirty days of the date the claimant becomes aware of the relation between the condition or accident at work and his injury.¹⁸ However, there is a presumption of timely notice and to invoke the bar; the employer must show by proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of the claimant's failure to provide timely notice as required by Section 12.¹⁹

EVIDENCE

***Claimant testified at trial in pertinent part that:*²⁰**

He is 40 years old and married, with a 21 year old daughter. He finished high school with three hours of welding credit. After he left high school he had a part time job working at a state park, but then started working on boats. From the

¹³ *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Britton*, 377 F.2d 144.

¹⁴ 5 U.S.C. § 556(d).

¹⁵ *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff’g* 900 F.2d 730 (3rd Cir. 1993).

¹⁶ *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh’g denied*, 391 U.S. 929 (1968).

¹⁷ *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff’d sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

¹⁸ 33 U.S.C. § 12(a).

¹⁹ 33 U.S.C. § 20(b); *Strachan Shipping Co. v. Davis*, 571 F.2d 968 (5th Cir. 1978).

²⁰ Tr. 31-148 (the summary of Claimant’s testimony appears confused and inconsistent at times because Claimant’s testimony was confused and inconsistent, particularly when he was asked about prior inconsistent statements he made at his deposition or asked to explain or reconcile conflicting or contradictory documents and records).

boats, he went to the rigs and shipyard. He did not have a welder's certificate or do much welding during the course of his work. He did a little contract welding, but most of the time he worked as a helper or did some fitting. Most of the welding he ever did was with Employer. He also started tacking there.

He did not have a previous accident while working for another company lifting a welding box. He did not recall ever working with a welding box except for Employer. From 20 Jun 00 to 31 Aug 00 he may have worked for Southern Oil Field Services as a welder. He had no recollection of injuring his back picking up a welding box while working for Southern Oil Field. He "guess[es] it might've happened. It's possible, ma'am. But I -- no, it didn't happen."²¹ He learned how to use welding boxes while working for Employer.

The first time he worked for Employer, he was with them for about a year and a half to two years. Before that, he worked on boats and worked contracts. During this period, he never injured himself on the job. The first time he left Employer it was for an easier and better paying job at Valentine. He had been trying for three years to get on with Valentine. Everyone at Employer, including Mr. Underwood, was happy for him and told him he should try it out. He left Employer on good terms.

He worked for three years at Valentine Paper Mill moving back and forth between different jobs. He was a run operator and helper, which was heavy duty work. While he worked at Valentine, he did not have any sort of injury on the job. He never hurt his back and never told anyone he hurt his back on the job at Valentine. He never said his current problem was from a previous injury at the paper mill, because he never got hurt at the paper mill. The most he earned with Valentine was about \$16.87 per hour and when he left, he earned \$16.05 per hour. He never filed a workers' compensation claim or told anyone he hurt his back while at Valentine. At the end of 2003, work was slow and he did not want to wait around to be laid off, so he went back to work for Employer.

He has a history of waking up with backaches and has treated with chiropractors. Given his type of work, after certain days or jobs, he wakes up with backaches. Friends and family advised him to go to Dr. Fernandez, a chiropractor. Dr. Fernandez told him he had a pinched nerve. Dr. Fernandez saw Claimant two or three times a week and gave him exercises, shock treatment, and adjusted his back. Claimant went for a certain period of time and the pain went away. He did not make a workers' compensation claim about his back at that time and recovered from that back problem.

²¹ Tr. 98.

When Claimant went to Dr. Fernandez in March 2003 for chiropractic care, he worked for Valentine Paper. He filled out a form for the doctor.²² On it, he indicated he was not sure if the injury was work related, but had reported it to his employer. He never had an injury. It was something that was ongoing and he would wake up in the morning in pain. He may have said work related not to jeopardize himself.

He passed a company physical for Employer before he started working for Employer on 8 Jan 04. He continued working for them through 25 Aug 04 as a welder. He worked the night shift from about five in the afternoon until six in the morning. His supervisor was Clyde Guidry and his foreman was Mike Bergeron. He worked a panel line in the same shop as the burning table and picked up welding lead and welding boxes while moving around. A welding box is a flux core box containing a spool of wire. It weighs between 50 to 75 pounds with the wand and the lead on it. He also had a bucket of tools, his shield, hammer, and chipping tool.

Prior to August 2004, he had not missed much work and did not miss any work because of his back hurting. He missed some days because of fluid build up in his knee, which he could not handle. He left early and went to the emergency room. The doctor told him to stay off his knee.

If he missed work, he called the personnel monitor and told them the reason he could not come in or would be late. They would contact his foreman. He would not speak directly with the foreman, Mike Bergeron. When he started working for Employer, he was not aware that Mr. Bergeron kept notes on the dates that he was absent. He did not recall talking to Mr. Bergeron about any previous health problems or back conditions before his on-the-job accident. He normally worked with three welders. Mr. Bergeron had other jobs to supervise and was not always there.

Claimant missed work the week of 19 Jul 04 as a result of family problems that had nothing to do with any medical conditions. He left work early on 24 Jun 04 and on 4 Aug 04, but did not recall why. He did not remember telling Bill Underwood that he had to leave because of an old back injury. He did not recall whether he ever told Mr. Underwood that he had an old back injury. He remembered leaving early quite a few times for his knee.

On the day of his accident in August 2004, he started work at five o'clock. At about ten o'clock he was moving from one section to another with his welding box to get a little more lead. The box had no wheels and he had to drag it. It is hard

²² EX-10, p. 4.

plastic with two flaps. He was pulling on it when it gave way and jerked him. He dropped the box and felt a sharp pain. He fell onto the box on a side angle. It was not the same pain that previously led him to the chiropractor. Up to that point, he had not had any problems doing his work.

He sat down after his accident. He told James Porter he hurt his back and was going to find Mr. Bergeron. Mr. Bergeron was not there at the time, so Claimant got up and walked to Mr. Bergeron's office. He waited there until Mr. Bergeron returned. He told Mr. Bergeron he had just hurt his back. Mr. Bergeron mentioned filling out an accident report, but then asked if Claimant did not have a history of back problems. When Claimant said he did, Mr. Bergeron told Claimant that they could not fill out an accident report because it was an old injury. Claimant figured Mr. Bergeron was trying to save his bonus for having no claims made under his supervision. Mr. Bergeron did not say he would lose his bonus for that quarter, but Claimant knew he would. Then Claimant left to go home. He used an ice pack and went to bed.

Prior to Claimant's testimony at the hearing, he had consistently maintained that the accident happened on 12 Aug 04. He was mixed up on the date. He knows that he missed a couple of days between the accident and 25 Aug 04. Based on Mr. Underwood's notes, Claimant now thinks the accident occurred on 9 Aug 04.

The next day, on 10 Aug 04, Claimant called Mr. Underwood to tell him that he was not coming to work. He told him he had hurt his back on the job and Mr. Bergeron refused to let him fill out an accident report. Mr. Underwood said Claimant would have to come in and discuss it. On 10 Aug 04, he might have told Mr. Underwood that he could have pinched a nerve. He did not know if that was before or after he went to the doctor. He remembered telling Mr. Underwood that he did not know what was wrong and that he may have pinched a nerve. He did not recall if he told him it happened at work.

His normal doctor, Dr. Vega, was out of town, so he saw Dr. Birdsall. He told Dr. Birdsall he hurt his back and had x-rays. He does not recall telling Dr. Birdsall that he injured his back at work. He first went to Dr. Birdsall on 26 Aug 04. He used an insurance card instead of workers' compensation. He did not know that if he had a workers' compensation injury, his health insurance would not pay for it. He was not sure if he discussed that topic with Dr. Birdsall. He returned to work and tried to work for a couple of weeks. He did not recall the exact dates and was not sure if he saw Dr. Vega before he returned to work.

Claimant did try to go back to work and worked the rest of that week and a couple of days of the next week. He worked full time on August 11-13, the week of 16 August, and on 23-24 August, but then could not take it anymore. When he came home from work he could not do anything physical and just rested.

On 25 Aug 04, he told Mr. Bergeron he could not keep working because of the pain and needed treatment. Mr. Bergeron wrote it down in the book. Mr. Bergeron did not want to fill out an accident report because he thought it was an old injury. Claimant left his tools in his locker and walked to the parking lot. Claimant was going to his truck and getting ready to leave when Mr. Bergeron drove up on his bike and suggested that Claimant fill out an accident report. Claimant asked if he had a blank form with him, but Mr. Bergeron said they would have to walk back to the office, which was a five to ten minute walk. Mr. Bergeron would not let Claimant drive to the office in his truck. Claimant told Mr. Bergeron he was in too much pain to walk and would have to fill out the form later. Claimant went home. He swears on the Bible that he told Mr. Bergeron it was a work related accident and Mr. Bergeron came and found him in the yard. He did not recall if he told Mr. Underwood, but knows he told Mr. Bergeron.

He went to see Dr. Vega and had an MRI. He was told he had herniated disks. He had never been told that before, although in the past Dr. Fernandez told him he had a pinched nerve. That is why he told Mr. Underwood it might be a pinched nerve.

Claimant then went to Dr. Ponder for a series of injections. He completed a form²³ for Dr. Ponder that said his condition was not due to an accident. He left the workmen compensation portion blank. While they were filling out the paperwork, Claimant's spouse asked him why he was not indicating the injury was under workmen's compensation. Claimant used his insurance card from Employer. He probably did not tell Dr. Ponder's nurse he had an accident at work because he was still collecting the checks. On 20 Sep 04, he returned to Dr. Ponder. It was around that time that Claimant started admitting it was a work related injury.²⁴ He told Dr. Ponder that he got hurt on the job because that is what happened. He got four injections and the pain went away. Dr. Ponder said Claimant had a little tear. He asked Dr. Ponder for a full release for work because he felt good.

Claimant felt great and tried to return to work. He was talking with Mr. Underwood, who gave Claimant forms to take to the doctor. Claimant filled out the form describing the accident at work. He did not recall telling Dr. Vega that

²³ EX-14, p. 5.

²⁴ Id. p. 9.

he had a work related accident. It is possible that he gave Dr. Vega the physician form for Prudential short-term disability,²⁵ but it was a long time ago and he did not remember. The top of the form has Claimant's hand writing, but Dr. Vega filled out the part about work related illness. It would be fair to conclude that he told Dr. Vega that his injury was not work related.

Mr. Underwood also told Claimant he would not be compensated if he filled out the form as work related and needed to file for short term disability instead. Consequently, Claimant changed the form. Mr. Underwood told Claimant to get the injections and Employer would get him a paycheck and put him back to work when he was ready. Claimant thought Employer would "take care of him."

He took Mr. Underwood the completed disability application. He had checked off that his injury was work related. He did not recall the exact conversation he had with Mr. Underwood, but recalled that Mr. Underwood told him that he would not collect a check if it was work related. Claimant felt like he was tricked into filing under short term disability. He did not recall if Mr. Underwood mentioned losing a bonus if Claimant made a workers' compensation claim.

In his deposition, Claimant testified that he specifically recalled Mr. Underwood telling him that if he had a work related accident, he could not get short-term disability. He changed the form to say not work related because he needed to pay bills and figured Employer would take care of him. He should not have been collecting the short term disability checks.

Claimant guesses he purposely misrepresented on his short-term disability benefit application that it was not a work related accident because no one filled out an accident report and he would not have gotten paid for his injury. He told Mr. Underwood that Mr. Bergeron would not fill out an accident report. However, he testified in his deposition that he did not know whether he actually had that discussion. There is a lot Claimant does not remember. It has been a while, but he is "doing his best."

Prior to meeting with an attorney, Claimant's intention was to pursue either short-term or long-term disability benefits. His attorney told him it was not a disability situation and Claimant did not want to get in trouble. Claimant felt that he was tricked into changing the form. When the company doctor told him he could not return to work, Employer dumped him. Claimant had to pay his own insurance at four times the regular amount.

²⁵ EX-8.

Employer sent Claimant to a doctor who did not even examine him and only filled out some paperwork. He did not recall telling Dr. Davis whether his accident was work related. The doctor looked at the records, talked to Claimant for a couple of minutes, and told him he could not return to any type of work. But for the fact that Dr. Davis would not clear him, Claimant would have tried to return to regular duty work. He just had the injections and was ready to go back to work. However, Dr. Davis would not let Claimant work at full duty until he knew if the shots would work. Employer also would not let Claimant do light yard work. When Claimant went back to Mr. Underwood, he was told Employer had no work for him. Claimant started realizing that he was going to be fired so Employer could save insurance costs. That is when he retained an attorney. He knew it was wrong to put on the Prudential form that it was not a work related accident. However, Employer went along with the fraud. As soon as his attorney told him he could go to jail for it, he pursued his claim under the Act.

He does not keep up with the difference between disability benefits and workers' compensation. He probably received a health insurance policy when he was hired by Employer, but give it to his wife. She probably looked at it. After he talked to his attorney, Claimant was aware that they probably would have to pay back what he collected. He did not want to go to jail for fraud, so he did what he should have done in the first place.

Since then, he has put on some weight and is afraid to work. He tries to exercise at home. He tried to get medical treatment, but had no insurance or compensation. His spouse got insurance, but there was a waiting period.

His attorney sent him for an examination with Dr. Pribil, a neurologist. He thought Claimant would require surgery, but wanted further testing, including a standing MRI and nerve test. No one would pay for the tests and they have not been done. Dr. Pribil's notes²⁶ say that that on 12 Aug 04 Claimant was carrying some welding rods while stepping over an iron and injured his back, but that is not what he told her. He told her it was a welding box. She must have misunderstood. He did not know why her records say that a year or two prior to this incident he developed back pain while working as a welder. He did not recall ever having an accident until the one with Employer.

Claimant has not been able to work since the injury. Companies do not want to hire people with back problems and some want a doctor's release. He has done hard labor his whole life and there is nothing else he can do. He has constant pain and does not want to try any lifting. He gets some pain medications from Dr. Vega. He would like to see Dr. Pribil.

²⁶ EX-5, p. 6.

He did not specifically recall meeting with Carla Seyler. He did not recall ever making a previous short term claim or workers' compensation claim.

He has not seen the surveillance video.²⁷ If it shows him leaning up against a truck during a Mardi Gras Parade, it was when his father was riding in the parade. He had a few beers. He could walk, but was not lifting any ice chests. He may have bent over to get something, but that does not mean he was not in pain. He leaned up against the truck to take some of the weight off. Sitting is the worst position and it is hard for him to get comfortable. He was able to get in and out of the bed of the truck and was sitting down in the back of the truck. He did not know he was being videotaped.

In early September 2004, he filled out medical history forms²⁸ for Dr. Vega and Dr. Ponder that said his back pain had started a few months earlier. According to those records, his pain actually began sometime around the end of June or beginning of July, but he should have said one and a half months. He was not accurate with his dates. In late September, his doctor filled out a form²⁹ that said his disability began about one and a half months prior to the date he last worked.

He knows that Employer has a rule that work related accidents must be reported. He tried to report it. He did not know that if a foreman does not cooperate and fill out an accident report, the employee is required to go to the personnel manager and report it. He testified in his deposition that he knew he was supposed to go to Mr. Underwood, which he did. Claimant told Mr. Underwood about the accident. He did not make sure that Mr. Underwood filled out an accident report.

He previously reported an accident when he pulled a muscle while working for Employer.³⁰ The accident was on a Friday, but he did not report it until the following Monday.

It is possible that his back pain first started in 1999. He did not recall treating with Dr. Birdsall for back pain, except for the one time after the incident with Employer. He did not deny having prior back problems, but says he got hurt on the job and the pain got worse. Before August 2004 or June 2004, Claimant was told that he had degenerative disk disease. He did not recall having an MRI before the one for Dr. Vega on 2 Sep 04, but it was possible. He did not know if he had a herniated disk before then. He then admitted to recurring back problems and seeing Dr. Birdsall for a back strain in 1998. In 1999, he went to Dr. Fernandez

²⁷ EX-39.

²⁸ EX-13; EX-14.

²⁹ EX-35.

³⁰ EX-5.

and had chiropractic treatments that helped him get better. In 2003, he went to Dr. Fernandez and was treated for a period of three months. He was doing great and decided to stop the treatments. The injections he got after his accident at Employer provided weeks of temporary relief.

He filled out employment medical questionnaires³¹ that say he has not had any past or present back pain. He wanted to get hired. In a medical history he completed for Dr. Vega, Claimant stated he never had severe pains in his back or neck or back injury. He did not recall indicating on the form that he had never been awarded benefits in a workers' compensation claim. But apparently he did. He stated that he does not have a good memory.

He currently receives benefits for an injury he received while working for St. Charles Towing, but does not know if it is a workers' compensation claim. However, he admitted in his deposition that he knew it was a workers' compensation claim. He will receive benefits until he is 51. Then he will receive lump sum payments every five years.

He got the checks from St. Charles Towing because a toothpick hit him in the forehead. He has told every doctor he has ever seen that the accident occurred. He believes the accident was in 1989. He is receiving a settlement. He was a seaman so it was not a workers' compensation claim. He does not understand the difference between a workers' compensation claim and a seaman's claim. He gets \$500.00 a month.

He did not recall if he ever made a workers' compensation claim in connection with the back strain that was noted in Dr. Birdsall's x-ray report. He was not sure. Apparently the records³² show a workmen's compensation for an injured back from when he worked for Delta Coatings. He did not recall an incident, but did not claim that he never had any problems.

Nothing happened in 1999 when he sought chiropractic treatment; he just woke up one morning hurting. The same was true in 2003. The pain after the accident at Employer was different. He never had a burning sensation like he did then.

About one month after the injections, he just woke up one morning with pain. He figured the injections wore off and the pain came back. He was not doing any activities that would make the pain come back.

³¹ EX-11.

³² EX-36.

He was in a car accident on 7 Apr 05, but his truck sustained only about \$600 in bumper damage and he was not hurt. It was a one time incident and not a lingering thing. His wife tore a disk. He was never referred to Dr. Haydel for complaints with his arms by Dr. Vega, but his wife was.

He did not recall telling Dr. Vega on 27 Sep 05, that he noticed worsening of his back pain radiating down the left leg with increased activity. He did not recall having a worsening of back pain cleaning up after Hurricane Katrina.

He did not know exactly how many short-term disability checks he got, but it took a long time in between checks. He did not know if he got his full amount. He got the checks through Mr. Underwood. When he saw Dr. Ponder on 20 Sep 04 and told him that the injury was work related Claimant was still getting disability checks.

The back pain he complained of on 13 Mar 06 was from his accident at Employer.

Claimant's Spouse testified at trial in pertinent part that:³³

She has been married to Claimant for 21 years and is familiar with his work for Employer. She works for a janitorial contractor hired by Employer.

One night he came home from work at about 12:15, limping and in pain. He said he had hurt his back. He said he fell with a big box. He did not go to work the next day. She went with him to see Mr. Underwood about benefits, but she stayed in the lobby. When they went, they did not have a disability form already filled out. The only form they had was from a doctor. Mr. Underwood had papers out on his desk for Claimant to sign. She overheard a conversation after that between Claimant and Mr. Underwood. Mr. Underwood said they would take care of Claimant. She did not know what he meant.

Claimant had back problems before the injury at Employer. He went to a chiropractor after he woke up with a backache. After a few months, he was fine. When he started working for Employer the second time in January 2000, he was in good shape and worked steadily. He missed work a few times for sinus problems.

Since this accident, he hurts all the time. He tries to do a little bit at the house, but always complains about his back. He is miserable. He has trouble walking almost every day. He walks with a limp. He also has problems standing or sitting for long periods of time. He cannot keep still.

³³ Tr. 148-164.

They were in a motor vehicle accident. When they got out of the truck she was okay, but the next thing she knew she could not turn her neck to the right. Claimant was fine. He got checked out by Dr. Vega just to be on the safe side. She did not recall Dr. Vega referring Claimant to Dr. Haydel for arm pain.

The first doctor Claimant saw was Dr. Birdsall because Dr. Vega was gone. Claimant asked Dr. Birdsall for an x-ray. He then made an appointment with Dr. Vega to evaluate the x-ray. Dr. Vega referred him to Dr. Ponder.

After he had the injections with Dr. Ponder, Claimant felt slightly better for a little while. He started moving around a little better and even said he felt like he was ready to go back to work. During that time, they received about four (4) short-term disability checks from Employer. They picked them up at Mr. Underwood's office. He only got disability checks for two (2) months. That went on for about two months when everything stopped. Claimant was terminated, his disability stopped, and his insurance was cancelled. That is when they went to see an attorney.

Claimant's back is now a lot worse than it was while he was seeing the chiropractor. He saw the chiropractor in 1999 and in 2003 because he started waking up with little backaches. Now, the pain is worse. It is a lot different.

She did not remember Claimant ever getting hurt at Valentine. She did not remember Claimant getting hurt or having x-rays while he worked for Delta Coatings. She did not recall an incident in 2000 where Claimant hurt his back lifting a welding box when he worked for Southern Oil Field as a welder.

They really did not know what to do to pay Claimant's medicals bills. She told Claimant to just use his group health plan card. She had read the short-term disability policies and health policies, but did not understand them and was not aware that the short-term disability policy would not pay if the injury was a result of a work related incident.

She did not recall if they had any discussions about whether submitting the bills to the health carrier was wrong because it was a workers' compensation case. They did not know what to do and were in a bind.

Claimant told her Mr. Bergeron refused to fill out an accident report and she told him to go back to Employer and fill one out. She did not know whether Claimant ever reported that he had a work related accident to Mr. Underwood. She did not

recall whether they had a telephone conference with Mr. Underwood to discuss getting the short-term disability benefits. She did not recall Mr. Underwood agreeing to send any documentation to Prudential on behalf of Claimant for the short-term disability benefits.

James Porter testified at trial in pertinent part that:³⁴

He worked for Employer from March 2001 until November 2005, as a tacker and welder. He worked the night shift with Claimant between January and August 2004. They worked anywhere from 5 to 25 feet away from each other. As far as he knows, Claimant did not sustain any accident while working for Employer. He never saw Claimant get hurt. Claimant never told him that he had been hurt.

Claimant never complained about his back, he only complained about his knee hurting and his sinuses. He said he had a prior back injury from working at the paper mill and had trouble with his back. He never went into any detail about it.

Mr. Porter did not recall the exact date of the last night he and Claimant worked together. But that night, he sat at a box in the back welding foundations while Claimant ran the automatic welders. Mr. Bergeron had Claimant teach Mr. Porter how to run the machines. Claimant showed him for about two hours. After their nine o'clock break, Claimant grabbed his gloves and his shield and he took off towards the box. Mr. Porter went to the back room.

When Mr. Porter came back from lunch at about 12:15, he saw Claimant pass as he turned toward the plant. Claimant never came back. Mr. Bergeron did not mention that Claimant hurt his back. Mr. Bergeron just said Claimant went home. After a couple of weeks, Mr. Porter heard Claimant had hurt his back.

The only time he saw Claimant after that was at the Thibodaux courthouse. Claimant said the doctors released him.

Steve Smith was the only person who contacted Mr. Porter about whether he was aware of Claimant being involved in a work related accident. He did not remember when. Mr. Underwood had told him he had to talk to an insurance officer, but never mentioned exactly what it was about. Mr. Smith just asked basic questions - if he saw Claimant get hurt or if Claimant ever said he got hurt at Employer.

³⁴ Tr. 165-178.

He was instructed that if he was ever involved in a work related accident to tell his foreman, the nearest foreman, or the safety man. There is an hour and a half video that tells what to do. If the foreman does not fill out an accident report the employee is supposed to take it to the superintendent or somebody else.

He missed work to testify at the hearing. His daily pay is about \$500-600.

He was not paid or promised to get his day's wages to come to testify. He has not received any money from the defense lawyer. He came voluntarily without a subpoena. He got a notice that told him what time to be at the courtroom. Mr. Underwood said he could ride with him.

He had pretty much the same job as Claimant. It was not hard. They had to lift a box that weighs about 70 pounds.

***Mike Bergeron testified at trial in pertinent part that:*³⁵**

He has worked for Employer for about fifteen years. He is currently a panel line night foreman. He keeps his own set of records on people he supervises and tracks missed work and other items.³⁶ He had occasion to supervise Claimant starting on 12 Jan 04. Claimant was a welder.

In his book, Claimant is employee number 33. He tracks information by quarters because that determines bonus eligibility. An employee is eligible for a bonus in a quarter if he does not get hurt or misses less than thirty-three hours. The foreman is entitled to a \$250 bonus if nobody on his crew is injured. He gets the bonus about half of the time.

His book shows that on 24 Jun 04, Claimant left work at midnight. He can not remember why. If Claimant had mentioned a back problem when he left early on 24 Jun 04, he would have noted it. On 30 Jul 04, Claimant left from 8:00 to 12:30. He thinks Claimant had some kind of family function. On 4 Aug 04, Claimant said he had to leave because his back was hurting. Mr. Bergeron asked him if he needed to fill out an accident report. Claimant said no because it was an old injury he got from the paper mill. He did not say how he got hurt at the paper mill.

³⁵ Tr. 179-197.

³⁶ EX-33; EX-20.

The notes show that on 9 Aug 04, Claimant left at 9:00, but he did not know why. On 24 Aug 04, Claimant came to the office and said he could not handle the pain anymore. His back still hurt and he had to leave. He said he was tired of messing with doctors. Mr. Bergeron asked Claimant if he needed to fill out an accident report and Claimant said no. He asked Claimant if he injured his back. Claimant said no, but that his back was killing him. Mr. Bergeron signed Claimant's card and Claimant left.

He never followed Claimant into the parking lot on a bicycle to ask him if he wanted to fill out an accident report nor did he refuse to fill out an accident report. If Employer finds out someone refused to fill out an accident report they will fire that person. Completed accident reports are turned into personnel. He would never refuse to fill out an accident report because it might cost him a bonus.

By 21 Jul 04, Claimant had already lost his safety bonus.

Sometimes when Claimant would miss work Mr. Bergeron would call the office to find out why he was not there. Mr. Underwood would not always let him know Claimant had called in.

He does not remember if he got a foreman bonus in the third quarter of 2004. He knows he lost the yearly bonus.

***An attendance log kept by Mike Bergeron shows in pertinent part that:*³⁷**

Claimant was out sick 19-22 and 30 Jul 04. He left work early (4 AM) on 4 Aug 04 when his back hurt from an "old engery" (sic). He left early (12 AM) on 25 Aug 04 when his back still hurt from an "old engery" (sic). He was out 26, 30, and 31 Aug 04 and 1 and 2 Sep 04.

***Bill Underwood testified at trial in pertinent part that:*³⁸**

He has worked for Employer for nine years. He has been an administration manager for eight months. Before that he was a personnel director. From January to August 2004, he was the personnel manager. He hired Claimant in January 2004. During his interview, Claimant said he worked at Valentine Paper Mill. He also had one to two years as a fitter and a welder.

³⁷ EX-20; CX-20.

³⁸ Tr. 197-237.

Claimant passed a physical on 7 Jan 04. The medical facility does not send any of the records to Employer. Even though he had a drug screen with his employment physical, it only shows if the levels in his system are higher than the cut off level. Claimant then went through orientation and filled out all his employment paperwork. They went over the Employee Handbook, reviewed the benefits handbook, did safety orientation, and watched an orientation film. There is also a lecture on general safety rules. Employees are instructed that all accidents, no matter how minor they may appear, have to be reported immediately. They sign a paper during orientation acknowledging that.

For an employee to receive a safety bonus, he has to miss less than thirty-three man hours and not have a recordable accident. They can report all the accidents they want, fill out all the accident reports they want, and still receive their safety bonus. As long as they miss less than thirty-three hours, they still receive the safety bonus.

If anyone on the foreman's crew has a recordable accident, then the foreman loses his safety bonus. A superintendent's bonus goes by percentage of the entire yard, not just his own department. That means if ten percent of the foremen on the yard lose their safety bonus, then all superintendents lose their bonus. Mr. Bergeron has been eligible for ten safety bonuses, but only received five. If a foreman, supervisor, or superintendent refuses to fill out an accident report, they would be terminated. Mr. Underwood's pay is not affected regardless of whether there were zero or twenty accidents.

Employees are instructed that if the foreman at the job refuses to fill out an accident report to report the accident to their foreman or the superintendent. They can also come to Mr. Underwood's office or the general manager's office any time during the day if they have any type of problem. He keeps a daily logbook and jots down notes of different calls or conversations that happen during the day.³⁹ He has between 500 and 1,200 employees.

On 6 Nov 00, Claimant called in because his back hurt. Claimant did not want to fill out an accident report. He mentioned a previous injury while picking up a welding box and said he needed time off to rest. It was reported as a possible compensation claim, just in case. Even though Claimant refused to fill out a report, Mr. Underwood filled one out for him, even though Claimant never signed it.⁴⁰

³⁹ EX-25.

⁴⁰ EX-5; CX-2.

On 10 Aug 04, Claimant called in about a pinched nerve in his back, said he was thinking of going to the doctor the next day, and that he might be out for about two weeks. During this time, Claimant mentioned numerous times to everyone that he was hurt from a previous injury at the paper mill. Claimant worked on 11 Aug 04 and did not miss any work until 25 Aug 04. Claimant did not call in on 25 or 26 Aug 04.

Mr. Underwood did not fill out an accident report in August 2004 like he did for the 2000 injury. In both cases, he investigated what happened. He completed an accident report for the 2000 injury because there were other people who said he may have been hurt at work. As for the 10 Aug 04 injury, he did not complete an accident report because everybody he spoke to told him the same thing-- that Claimant told them he got hurt at the paper mill. Mr. Underwood spoke to Mr. Bergeron and Clyde Guidry about it. He may have talked to others also, but did not recall. The 10 Aug 04 injury ended up being nothing and that is why there is no accident report written on it. If he had found any indication that the 10 Aug 04 injury, could have happened at work, he would have completed an accident report for Claimant, even if Claimant did not want to fill one out.

He recalls meeting with Claimant to do his disability paperwork. He went over the form with Claimant when Claimant came to pick it up. He highlighted the sections for Claimant and Claimant's doctor to complete and told Claimant to bring it back. Claimant did not fill it out in the office. When Claimant left, the form was blank.

On 8 Sep 04, Claimant returned with the completed form.⁴¹ While they reviewed it, he noticed Claimant had checked off that it was a work related injury; but that the doctor had put that it was not a work related injury. He asked Claimant if it was a work related injury and Claimant replied that it was, but not from Employer. It was a previous work related injury. Claimant said he was confused by the question on the application, so he scratched it out and changed his own answer. Mr. Underwood made Claimant sign his name to the paper, showing that he was the one that changed it. He told Claimant that if he sent the form in as Claimant had originally completed it, with him stating it was work related they would not pay him short-term disability. Claimant insisted that this was a previous work related injury from the paper mill.

⁴¹ EX-6; EX-7; EX-8.

He filled out the employer section of the form in front of Claimant. He asked Claimant if he intended to file a workers' compensation claim. Claimant said no.

If Claimant had filed a workers' compensation claim, he would have put that claim through for weekly compensation benefits. It did not matter to him whether Claimant received short-term disability benefits or workers' compensation benefits. No one at Employer has ever instructed him to steer employees towards short-term benefits and away from workers' compensation. He would not have signed the form if he had any indication that Claimant had a work related accident.

After that, Claimant would come in at least on a weekly basis to pay his share of his regular health insurance premiums and to pick up his check. The purpose of making him come in is to give Employer a way to keep track of employees.

On 25 Oct 04, Claimant tried to come back to work and was sent for clearance by the company doctor. Occupational Medical Service called to say they were not going to release him for heavy labor.

Eventually the disability insurer cut Claimant off because his doctor said he could come back to work. He spoke to Claimant and his wife during that time frame and explained that once the insurer understood that one doctor referred him to another doctor that should solve the problem. He faxed that explanation to the insurance adjuster. He thinks the short term benefits resumed, but was not sure if they ran the full time or not. The short-term disability is only good for twelve weeks.

He never told Claimant to submit his bills from Dr. Vega or Dr. Ponder through his health insurance, rather than through workers' compensation.

The office closes around five thirty or six o'clock, but if an employee wants to complain Mr. Underwood's numbers are posted on every bulletin board. He greets them when they come to work in the evening and when they leave in the morning.

Employer did not offer Claimant light duty work. If the doctor said that Claimant could do light duty work, Employer would have possibly offered him light duty work. Employer has never offered Claimant light duty work. Employer discharged Claimant, but he could not recall the specific reason. The pink slip indicates he was discharged on 19 Nov 04 because he was not released to return to regular duty. Claimant would have had short term disability and subsidized health insurance up to that point. The company pays the premiums for short term disability and the employee pays them for long term. He did not terminate

Claimant on 25 Oct 04 because he was trying to keep him on short term disability and carry him over to the long-term.

The first indication he had that Claimant was claiming that he had a work related accident while working for Employer was when he received the December 2004 letter from Claimant's attorney.

***Bill Underwood's notes reflect in pertinent part that:*⁴²**

On 6 Nov 00, Claimant called in to say his back hurt, but he did not want to complete an accident report. Claimant said it was a previous injury from picking up a box at Southern and he needed time off to rest.

On 10 Aug 04, Claimant reported a pinched nerve in his back and said he would be going to the doctor the next day.

On 2 Sep 04, Claimant said he needed X-rays and an MRI and would not be coming in.

On 25 Oct 04, Claimant reported a pulled muscle in his back and said he needed four injections.

Dr. Vega originally took Claimant off of work only through 12 Oct 04 and did not send any other information to the short term disability insurer. When Dr. Ponder also sent the insurer information on Claimant, the insurer needed referral paperwork.

***A note signed by Bill Underwood states in pertinent part that:*⁴³**

On 8 Sep 04, Claimant brought the short term disability forms in and had checked that it was a work related accident. When asked, Claimant said he had suffered the injury working at the paper mill a long time before. As far as Employer was concerned, it was a personal problem. Claimant said he had not filled out an accident form or reported an accident to his supervisor. He said he had been confused by the form and changed it to read not work related.

⁴² EX-25.

⁴³ EX-19.

Clyde Guidry testified by deposition in pertinent part that:⁴⁴

He has worked for Employer since 1980 and is the superintendent of the fabrication shop. He has known Claimant since Claimant started working for Employer. Claimant's foreman was Mike Bergeron. Mr. Bergeron was one of the foremen that he supervised. In August 2004, he worked the night shift, which started at 5 P.M. and ended at 6 A.M. He never knew Claimant got hurt on the job.

One time he asked Claimant about missing some work and Claimant said his back was hurting. Claimant did not say why his back hurt. He asked Claimant if he got hurt on the job and Claimant said no. He asked Claimant about an accident report, but Claimant said it was not necessary. Claimant said he hurt his back at the paper mill. He did not recall the date of the conversation.

Employer's employee handbook states in pertinent part that :⁴⁵

Employees and foremen can earn a bonus by not having any recordable accidents in a quarter. Employees are required to immediately report all accidents and unreported accidents will result in lost bonuses. Not reporting an accident or encouraging an employee to not report an accident may result in immediate termination.

Employer's employee absentee calendar shows in pertinent part that :⁴⁶

Claimant missed work on 6 and 7 Nov 00. Claimant worked 11-13, 14-19, and 22-25 Aug 04. He went on short term disability on 30 Aug 04.

An accident summary from Employer shows in pertinent part that :⁴⁷

On 6 Nov 00, Claimant did not report for work and called to say his back hurt. He did not mention anything about an incident at work. Claimant said his back had done the same thing before and he had been to many doctors, even a chiropractor. He said he was just going to stay home and rest. On 8 Nov 00, came back to work and said he hurt his back at work on 3 Nov 00 while lifting materials, but that it did not bother him until the next day. Employer completed an accident report.

⁴⁴ EX-34.

⁴⁵ EX-1.

⁴⁶ EX-2.

⁴⁷ EX-5.

Claimant's short term disability policy states in pertinent part that:⁴⁸

Employees are not covered for occupational sickness or injury.

Claimant's application for short term disability and claim information page show in pertinent part that:⁴⁹

Claimant applied for short term disability on 2 Sep 04. He indicated he had seen Dr. Vega and Dr. Birdsall and suffered from lower back pain that interfered with his ability to do heavy lifting. The blocks indicating that the claim was work related and that Claimant intended to file a workers' compensation claim were checked, but scratched out and the other blocks, reflecting a non work related injury, were checked. Claimant signed beneath those changes. Mr. Underwood checked on the form that it was not work related and that no workers' compensation had been filed.

Claimant was paid short term disability from 3 Sep 04 to 26 Oct 04, when his coverage was terminated. He was disallowed long term disability on 10 Dec 04.

Claimant's long term disability policy states in pertinent part that:⁵⁰

Claimant applied for long term disability on 20 Sep 04. He indicated his disability was not due to accident, but due to an illness. He stated his last day of work was on 26 Aug 04 and his illness began approximately 1 ½ months prior to that date. On 24 Sep 04, Dr. Ponder endorsed his application, stating that Claimant was symptomatic about 2 ½ months prior to that date and was limited to light duty.

Claimant's intake form for Dr. Fernandez states in pertinent part that:⁵¹

He presented on 5 Apr 99 with lower back pain. Within the last year, he had back x-rays, which were normal. He circled yes for accidents on the job and said he was employed at Coastal Services.

He presented again on 11 Feb 03 and complained of low back pain. He stated he was not sure if it was work related, but said he had reported it to his employer. He said he was employed by Valentine Paper.

⁴⁸ EX-17.

⁴⁹ EX-6-9; CX-11-14.

⁵⁰ EX-35; CX-1.

⁵¹ EX-10.

Cut Off Family Practice medical records state in pertinent part that:⁵²

Claimant presented on 26 Aug 04 complaining of lower back pain. He reported a history of back pain and treatment with a chiropractor until September 2003. There was no indication of a work related injury. Claimant was prescribed medication. X-rays showed disc space narrowing at L4-L5 and L5-S1 and suspected degenerative disc disease.

Dr. Vega's records reflect in pertinent part that:⁵³

Claimant presented on 1 Sep 04 complaining of lower back pain that started four months earlier.

On 11 Apr 05, Claimant presented to Dr. Vega complaining of neck and back soreness after being in a car accident on 7 Apr 05. Dr. Vega diagnosed a mild c-spine sprain.

On 19 Apr 05, Dr. Vega received a request for Claimant's records from the state disability office because Claimant claimed disability for 3 damaged discs and nerve damage.

On 22 Apr 05, Claimant complained of pain in his arms and was referred to Dr. Haydel.

On 27 Sep 05, Claimant reported worsening of back pain with his increased activity since Hurricane Katrina. On 28 Sep 05, Dr. Vega signed an attending physician statement that Claimant had symptoms of lumbar radiculopathy that first appeared on 7 Apr 05, for which he first treated Claimant on 11 Apr 05, and that would totally disable him for 3 to 6 months.

Dr. Ponder's records reflect in pertinent part that:⁵⁴

Claimant completed a form that indicated he had bad pain which had started about 2 ½ months earlier when he lifted up his welding box. He also indicated that an MRI in 2004 showed 2 herniated disks. He reported he had seen a chiropractor for a couple of months about 14 or 15 months earlier, but had been without pain until a few months ago. He described his work as a welder and said he had missed one month of work. He indicated his condition was not due to an accident. He left the

⁵² EX-12.

⁵³ EX-13; CX-4.

⁵⁴ EX-14; CX-7.

blocks concerning workers' compensation blank and wrote that he would be covered by his group health plan.

Claimant told the doctor him that he had low back pain about a year before, but had been treated by a chiropractor and the pain had improved. Now, the pain had started again. The doctor's impression was symptoms consistent with lumbar radiculopathy and that lumbar spondylosis is a large factor in Claimant's pain. The doctor indicated that while Claimant had a bulging and herniated disc neither appeared compressive.

On 23 Sep 04, Claimant had a steroid injection. He stated he had been working at full capacity and believed the exertion could be aggravating his symptoms.

Phone calls from Claimant and his spouse to the clinic over the next two weeks indicated that on various days, Claimant was doing fine, good, pretty good, and much better.

On 25 Oct 04, after three injections, Claimant reported 95% improvement in his back and asked for a full release to return to work, which the doctor approved.

On 18 Nov 04, Claimant called to complain that Employer's doctor would not clear him to full duty because of the records indicating a herniated disc. Claimant reported there was no light duty available and his benefits were running out.

On 6 Dec 04, Claimant reported regression to no relief. Claimant also stated the case was now a workers' compensation case and he had retained an attorney. On 5 Jan 05, Claimant requested a referred to Dr. Pribil.

***Dr. Pribil's records reflect in pertinent part that:*⁵⁵**

Claimant presented on 24 Feb 05. He informed Dr. Pribil he had injured his back on 12 Aug 04 when he lifted his welding box. He reported that a year or two before he had developed back pain, but had treated with a chiropractor and the pain went away. Claimant told Dr. Pribil that after his injury he had been asked to sign release papers by Employer and did so. After that led to his losing his insurance, he retained an attorney.

⁵⁵ CX-5.

***Occupational Medical Services records reflect in pertinent part that:*⁵⁶**

On 25 Oct 04, Claimant was seen for a return to work evaluation. He reported having missed several weeks of work because of a recurrent back problem and that his back problems were not work related. He was diagnosed with severe lumbar disc disease with evidence of herniated disc and degenerative changes.

He was cleared to return to work, but with a maximum of 50 pounds lifting and 25 pounds carrying for short periods of time.

***Letters from Claimant's attorney state in pertinent part that:*⁵⁷**

On 3 Dec 04, Claimant retained his attorney.

On 6 Dec 04, Claimant's attorney notified Mr. Underwood, by mail, that he had met with Claimant. Claimant's attorney informed him that Claimant's injury should not be the subject of a disability claim, but was clearly a workers' compensation claim.

On 6 Dec 04, Claimant's attorney filed an LS-203 alleging that on or about 12 Aug 04, Claimant suffered two herniated discs, degenerating discs, and back pain while picking up his welding box.

***Radiology reports show in pertinent part that:*⁵⁸**

A 1998 x-ray of Claimant's back showed minimal narrowing of the L5-S1 disc space and no other abnormal lumbar findings.

A 2003 MRI pelvic lumbar scans showed joint inflammation at L1-L5, swollen lumbar spine stabilizing muscles, and swelling about the erector spinae muscle and concurrent lumbar spine.

A 26 Aug 04 x-ray showed narrowing of the L4-L5 and L5-S1 disc spaces with suspected degenerative disc disease.

A 2 Sep 04 MRI had findings consistent with degenerative disc disease at L3-L4, L4-L5, and L5-S1, with disc herniations at L4-L5 and L5-S1 and neural foraminal narrowing predominantly at L3-L4 and L4-L5.

⁵⁶ EX-15; CX-27.

⁵⁷ EX-22; EX-28; CX-15;

⁵⁸ EX-26.

***Claimant's group health plan insurance records show in pertinent part that:*⁵⁹**

Claimant's medical care for his back from 26 Aug 04 through 25 Oct 04 was covered by his group health plan.

***Lady of the Sea Hospital records show in pertinent part that:*⁶⁰**

In 1998, Claimant had care that was covered by workmen's compensation payments.

***Family Medical Services records reflect in pertinent part that:*⁶¹**

On 7 Jan 04, as part of his application to work for Employer, Claimant completed a form, indicating he had never had any back trouble.

***Claimant's responses to interrogatories state in pertinent part that:*⁶²**

On 12 Aug 04, he hurt his back while lifting his welding box. He told James Porter and Mike Bergeron that he hurt his back. Claimant later learned that Mr. Bergeron refused to make a written report.

***Claimant's employment records with Valentine Paper show in pertinent part that:*⁶³**

Claimant started working for Valentine on 25 May 01 and walked off the job on 17 Nov 03. On 25 May 01, Claimant completed a form, indicating he had never injured or had trouble with his back. There was no accident report or indication of a work related back injury in the records.

***A surveillance video from February 2006 shows in pertinent part:*⁶⁴**

Claimant washed a truck with a pressure hose at a self serve car wash. Claimant also drove a pickup truck and stood next to a pickup truck for an extended period. Claimant climbed into and out of the bed of a pickup truck over the side. Claimant sat in a chair in the bed of the pickup truck.

⁵⁹ EX-32.

⁶⁰ EX-36.

⁶¹ CX-26.

⁶² EX-38.

⁶³ CX-24.

⁶⁴ EX-39.

ANALYSIS

Conflicting Testimony on Key Facts

There are a large number of direct and key contradictions in the witnesses' testimony in this case:

Four witnesses testified that Claimant reported having previously injured his back while working at a paper mill. Claimant denies ever having told anyone that he was injured at the paper mill.

Claimant insists he told a co-worker at the time of the alleged injury that he had hurt his back. However, the co-worker denies Claimant ever said anything about it and states he heard about the injury weeks later from their foreman.

Claimant maintains that he went to his foreman and reported the injury, but the foreman asked Claimant if he did not have a history of back problems. When Claimant admitted he did, the foreman refused to complete an accident report. In contrast, the foreman testified that he asked Claimant if he wanted to complete an accident report, but Claimant said it was an old injury and he did not want to complete one.

Claimant specifically recounted an incident that occurred on the day he stopped working. He testified that the foreman rode a bicycle out to the parking lot and asked him to complete an accident report. However, the foreman did not have a blank form and would not let Claimant drive back to the office. Since it was a long walk, Claimant told the foreman he would do it later. The foreman testified that the incident never happened.

Claimant described the process by which he applied for short term disability. He testified that he completed an application, checked the box indicating his injury was work related, and told the personnel manager his foreman refused to complete an accident report. His manager told him that if the injury was work related he could not receive short term disability. The manager indicated that if he changed the form to non-work related, he would get short term disability and Employer would take care of him. The manager testified that he gave the blank application to Claimant with various sections to complete. Claimant returned with it and while his doctor had checked non-work related, Claimant had checked work related. The manager asked about the conflict and Claimant said he was confused. Claimant explained the injury was work related, but not from working for Employer—it was from the paper mill. Claimant then changed his answer and signed it.

Witness Credibility

Given the clear conflict to the witnesses' accounts of the facts and the direct relevance of those factual disputes to the issues in this case, the credibility assessment of the witnesses is crucial.

James Porter appeared in person. His demeanor and manner were very positive and he appeared to be very candid and forthright. While there was some discussion of whether or not he was paid by Employer to appear he testified that he was not. Although he rode to the hearing with Mr. Underwood, the record indicated he was subpoenaed. His testimony was corroborated by the testimony of other witnesses. In sum, I found Mr. Porter to be a very credible witness.

Clyde Guidry testified by deposition and I could not assess his demeanor. He is a long term employee of Employer. Nonetheless, his testimony was internally consistent and corroborated by the testimony of other witnesses. I found him to be credible.

Mike Bergeron appeared in person. He is a foreman for Employer and could arguably be subjected to disciplinary action if he were to admit Claimant's version of the facts was true. Nevertheless, his demeanor in court was positive and he was able to rely on notes taken contemporaneously with the events in issue. He seemed certain of his answers, which were consistent. His testimony was also corroborated by the testimony of other witnesses and the documents in the case. I found Mr. Bergeron to be a credible witness.

Bill Underwood appeared in person. He is a manager foreman for Employer and could also arguably be subjected to disciplinary action if he were to admit Claimant's version of the facts was true. Like Mike Bergeron, his demeanor in court was positive and he was able to rely on notes taken contemporaneously with the events in issue. He seemed certain of his answers, which were consistent. His testimony was corroborated by the testimony of other witnesses and the documents in the case. I found Mr. Underwood to be a credible witness.

Claimant's spouse appeared in person. She had an average demeanor for trustworthiness in court. However, her interests are clearly aligned with Claimant's and much of her testimony was based on what he told her. Moreover, there were a number of things she could not recall and some inconsistencies between her testimony and other evidence in the case, particularly as to their interactions with Mr. Underwood in regards to the short term disability application.

Claimant appeared in person. He was often confused and inconsistent in his testimony, conceding he was not good at dates and did not have a good memory. He has the most substantial personal interest in the outcome of this case.⁶⁵ His demeanor and manner in court were negative in terms of being a reliable witness. His key testimony was substantially uncorroborated and in large part directly contradicted by other testimony and documents in the case. He was impeached with inconsistencies⁶⁶ and prior falsehoods.⁶⁷ I did not find Claimant to be a credible witness.

Discussion

Four credible witnesses testified that Claimant reported having injured his back while working at Valentine. The absence of any injury report from the Valentine records is a factor in contradiction. However, it is probable that Claimant elected not to report the problem to Valentine as work related, as it actually was a symptom of a back condition that existed before he started working at Valentine and for which he treated with his chiropractor as early as 1999. Moreover, when he treated with the chiropractor again in 2003, he was working for Valentine and indicated he was not sure if his back problem was work related, but had informed Valentine anyway. Given his level of ambiguity as to whether his back problem was related to work,⁶⁸ and the fact that it appears not to have a significant effect on his work at the time, it is not surprising that Valentine may have not made any record of it and that Claimant may have later decided his back problems were due in part to working at Valentine.

The evidence supports a finding that Claimant started having back pain again in early August 2004. While his testimony is that the pain was now significantly different from what he felt before, that testimony is inconsistent with what he told Mr. Underwood and Mr. Bergeron at the time, which was that the injury was on old one. He told Mr. Underwood he had a pinched nerve, which is what he believed he had before. Given the absence of any clear diagnostics showing a change in August 2004, the medical evidence is not as reliable as Claimant's contemporaneous statements to Employer.

The evidence does not support Claimant's testimony that he essentially tried to tell Employer that his injury was a new one sustained in August 2004, but was tricked into changing his story by Employer. While Mr. Bergeron, in general, may have had a motive to minimize accident reports, the evidence is that he only got that bonus 50% of the time

⁶⁵ Although this is true in every case in which a party testifies and should not be grounds for automatically discounting credibility, it must be considered, particularly in terms of assessing inconsistent statements by that party/witness.

⁶⁶ Claimant testified that Mike Bergeron told him he would not make an accident report, but in interrogatories stated he later learned Mike Bergeron did not do an accident report.

⁶⁷ Claimant failed to disclose his previous back problems on job applications in order to increase his chances of being hired.

⁶⁸ An ambiguity that carried over into his descriptions of his condition to Employer in 2004.

and it was not unusual for him to lose the bonus. Moreover, he could be fired for discouraging an employee from making an accident report. Although Mr. Underwood was not under the same bonus program, he too would be in jeopardy of losing his job if he discouraged an employee from making an accident report. Consequently, he would have an equal, if not stronger motive, to ensure an accident report was filed if there was any question. That is corroborated by the November 2000 report, completed in spite of Claimant's statement that his previous injury was not work related.

The weight of the credible evidence in the case shows that Claimant had a pre-existing back injury for which he had sought treatment in the past. In August 2004, his symptoms returned. He believed those symptoms to be a reoccurrence of the same condition for which he sought treatment from the chiropractor, first in 1999 and the while working for Valentine. He was not clear whether the back problem was work related to Valentine, but believed it was not related to Employer. That is what he told Mr. Underwood and Mr. Bergeron. He was certain enough that his back problem was not related to his work for Employer that he refused Mr. Bergeron's offer to complete an accident report. When he submitted the short term disability form, his check of the work related box was consistent with his ambiguity about the back problems he had at Valentine and after discussing it with Mr. Underwood, Claimant decided to change his response. At that point, he had given no one (except, according to her testimony, his spouse) any reason to believe that his problem was related to his work for Employer.

Claimant's first indication of a possible relationship between his work for Employer and his back pain was on 19 Sep 04. He completed a history for Dr. Ponder stating the pain started some 2 ½ months earlier when he lifted up a welding box. Yet, Claimant also indicated to Dr. Ponder he had a history of back pain that had been successfully treated by a chiropractor and that the pain had started again a few months earlier. He still indicated that the injury was not due to an accident, left the workmen's compensation section blank, and used his group health plan. At that point, Claimant still fundamentally believed his back pain was not related to his work for Employer.

Over time, Claimant discovered that he would not be allowed to return to work or be given light duty, his short term benefits would be discontinued, and his insurance would become much more expensive. He was unhappy that Employer had not "taken care of him" as it had promised and retained an attorney. It was only then that Claimant concluded he had engaged in fraud and notified Employer that in fact his pain was not the latest return of a previous chronic condition, but rather a consequence of an injury sustained while working for Employer.

In order to invoke Section 20(a) presumption, Claimant must carry his burden and establish physical harm or pain. However, the preponderance of the credible evidence establishes that more likely than not, Claimant's pain in August 2004 was not a new physical harm or pain or even an aggravation of a pre-existing harm or pain. Instead, the

record shows that it was more likely than not the most recent reoccurrence was the natural progression of Claimant's degenerative disc disease. That is what Claimant consistently (even in the face of suggestions to the contrary) told others. That is what he believed it to be.⁶⁹ It is consistent with the medical evidence and I find it as fact.

Claimant has failed to carry his burden to establish a new injury or aggravation.

ORDER AND DECISION

Claimant did not suffer a new injury or aggravate a previous existing injury while working for Employer in August 2004.

The Claim is **Denied**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

⁶⁹ It is possible that after consulting with counsel and discussing the issues, Claimant is now convinced that his current version is true. Whether his inconsistencies are attributable to flawed memory, a good faith change of mind, or an intent to deceive, I find his testimony and statements after December 2003 to be of highly diminished probative value.